BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

WILLIAM EDWARDS
Claimant

VS.

INDUSTRIAL CHROME INC.
Respondent

AND

ACE AMERICAN INSURANCE COMPANY
Insurance Carrier

Docket No. 267,680

ORDER

Respondent requested review of the March 17, 2003 Award of Administrative Law Judge Bryce D. Benedict. The Board heard oral argument on September 4, 2003.

APPEARANCES

Roger D. Fincher of Topeka, Kansas, appeared for the claimant. J. Scott Gordon of Overland Park, Kansas, appeared for the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge (ALJ) issued an Award on March 17, 2003, awarding claimant a 12 percent functional impairment to the body as a whole based upon the opinions of Dr. Edward J. Prostic, the independent medical examiner appointed by the ALJ pursuant to K.S.A. 44-510e(a). Respondent appeals this Award and contends the ALJ erred, as a matter of law, in entering an award against respondent for permanent partial

disability benefits. Based upon the principles set forth in *Lott-Edward*,[1] respondent believes it has no liability for anything other than medical expenses incurred related to the carpal tunnel complaints expressed by claimant during the period it employed claimant as he was terminated by respondent in July 2001 and went on to work for other employers performing what respondent believes was repetitive upper extremity work.

The claimant requests the Board affirm the ALJ's Award. Claimant maintains that his work subsequent to that for respondent was not as repetitious, particularly his present employment and his duties for the three employers he has had since leaving respondent's employ have not permanently worsened his bilateral carpal tunnel condition.

The sole issue to be resolved is whether the ALJ appropriately assessed the 12 percent permanent partial impairment to the body as a whole against respondent.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board finds the ALJ's Award should be affirmed.

It is undisputed that claimant sustained a bilateral carpal tunnel injury while working as a machinist for respondent. The ALJ found the date of accident to be June 13, 2001, although he accurately pointed out that March 2001 would be a more appropriate date as claimant was transferred from the machinist department to that of hard chrome plating, a job that was less repetitious in nature.[2]

The medical records indicate claimant began experiencing symptoms in his upper extremities in the summer of 2000. Claimant originally sought treatment through his family physician. Once nerve conduction testing revealed the existence of carpal tunnel syndrome, the claimant reported this to the respondent as a work-related injury and conservative treatment was provided. The record indicates that surgery was a possibility. Even after claimant was transferred to the less repetitive job, his symptoms remained about the same. In July 2001, claimant was fired for reasons wholly unrelated to his carpal tunnel condition.

He then obtained a position in a Wal-Mart distribution center which required him to collect oversized goods from shelves and place them on a cart for loading. These items were too large for the conveyor system and had to be hand-loaded on to the cart. At Wal-Mart claimant was scheduled to work three 12-hour shifts each week. After working two

---

[1] *Lott-Edward v. Americold*, 27 Kan. App. 2d 689, 6 P.3d 947 (2000).

[2] Award at 4.

weeks and one additional 12-hour shift, claimant left that job. According to him, the job was too strenuous and hurt his arms and hands.

In September 2001 he found employment at another company, Horizons, as a machinist. He stayed in that job approximately one year making rotors. This required the use of machines, much like his job for respondent, although he describes the job as less repetitious. When that job relocated to Pittsburg, Kansas, claimant began a job at Krupp, operating large computer-assisted machines making rubber parts. He must set up the machine once a day and spend the balance of his shift observing the machine while it operates. Claimant testified that during his time at Horizon and now with Krupp, the condition in his hands remained basically the same.

Pursuant to the ALJ's Order, claimant was evaluated by Dr. Edward J. Prostic, for purposes of determining his permanent impairment rating. Following an examination and review of the pertinent medical records, Dr. Prostic assigned a 12 percent to the body as a whole for claimant's bilateral carpal tunnel complaints. Although Dr. Prostic's report is automatically considered part of the record pursuant to K.S.A. 44-510e(a), respondent elected to depose Dr. Prostic as respondent believed Dr. Prostic had not been made aware of claimant's subsequent employment activities and had he known claimant had continued working in what respondent believed was repetitive jobs, Dr. Prostic would have assessed all or part of the 12 percent against the subsequent employers.

During his deposition, respondent's counsel fully informed Dr. Prostic of claimant's employment activities since July 2001 and of the symptoms claimant experienced during that time. He was also asked to review the EMG results dated December 19, 2000, and claimant's own testimony from the regular hearing. Having been fully apprised, Dr. Prostic remained steadfast in his attribution of the 12 percent impairment. In his opinion, claimant's condition in February 2002 (when Dr. Prostic examined him) was not materially changed from when the claimant was evaluated by Dr. Lynn Ketchum in July 2001. In short, he testified that he believed there had been no permanent worsening of claimant's condition while he worked for Wal-Mart or Horizon. To the extent his symptoms increased, it was a temporary aggravation. According to Dr. Prostic, claimant's condition has remained stable since leaving respondent's employ.

The ALJ's recitation of Dr. Prostic's testimony is accurate. Despite counsel's attempts to redirect or color the physician's testimony, the fact is that Dr. Prostic assessed the entire 12 percent permanent partial disability against respondent because the disability resulted from claimant's work for respondent. Claimant may have worked for other employers but his own testimony was that his complaints remained steady and did not permanently get worse. Although the work he did for Wal-Mart may have temporarily caused his symptoms to increase, he stopped working there and moved on to other employment. The two jobs he has held since that time are less repetitious and have not caused his symptoms to increase in any significant manner.

The ALJ's factual finding apportioning the entire 12 percent impairment against the respondent is further justified by the fact that no physician has testified there was any permanent worsening of the claimant's condition.

The record discloses a discussion between the ALJ and counsel regarding the Court of Appeals holding in *Lott-Edward*. That case involved a claim for repetitive injuries over a period of time while the claimant was employed by the same employer. Because there was a series of insurance carriers implicated in the claim, the *Lott-Edwards* Court addressed the division of liability as between those carriers for a repetitive injury claim. Here, the ALJ specifically found claimant did not suffer any repetitive injuries after he left respondent's employ, other than a temporary exacerbation while at Wal-Mart that resulted in no permanent impairment. For that reason, the ALJ concluded that *Lott-Edwards* did not apply. The ALJ's reasoning is reasonable and accurate.

Respondent's argument seems to expand the *Lott-Edwards* rationale well beyond its intended parameters and would obviously discourage employers from hiring injured individuals even if the available work was well within their capabilities out of fear that it might incur liability. Such a rule would also encourage employers to terminate perceived or actually injured employees in the hopes that they will obtain employment elsewhere, thereby avoiding liability for permanency. Obviously, this was not the intent of the Court of Appeals when deciding *Lott-Edwards*.

The ALJ's findings and conclusions are well founded and are hereby affirmed.

AWARD

WHEREFORE, it is the finding of the Board that the Award entered by Administrative Law Judge Bryce D. Benedict dated March 17, 2003 is hereby affirmed.

IT IS SO ORDERED.

Dated this ____ day of September 2003.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
J. Scott Gordon, Attorney for Respondent
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director